POINT I.

Under this point, respondents apparently intend to argue that an attorney in New Mexico does not have a charging and retaining lien to secure him for his services, stating amongst other things that New Mexico has no statute giving a charging or retaining lien to attorneys. As a matter of fact, New Mexico does have such a statute.

Section 19-303, New Mexico Statutes, 1941, Annotated states:

> "In all the courts of this State, the common law as recognized in the United States of America shall be the ruling of practice and decision."

In Pritchard vs. Fulmer, 22 N.M., 134, 159 P. 39, 2 ALR, 474, the Court says:

> "There being no statute here, in order to determine the right of an attorney in this regard in this State, we are necessarily required to resort to the Common Law and to the practice prevailing in Courts of Equity in such cases. The English courts, at an early date, not easy of ascertainment from the reported cases, recognized the right of an attorney to retain papers or other property that might come into his possession or money that he in the course of his professional employment had collected, until all his costs and charges against his client were paid * * * The courts also recognized what is generally styled an attorney's 'Charging Lien', although it has been frequently stated by the courts and law writers that in a strict sense there is no such a thing as a lien upon a thing not in possession."

The Court states further in its decision:

> "The charging lien, as recognized by the courts, is the right of an attorney or solicitor to recover his fees and moneys expended on behalf of his client from funds recovered by his efforts and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his rights to the same, and also to prevent or set aside assignments and settlements made in fraud of his right. * * * It does not usually attach until the recovery of judgment and then does not prevent an honest settlement nor payment to his client until attorney has notified the debtor of his intention to claim a lien."

The only Judge who has passed upon this question was the State District Judge and he must have been convinced that the Pritchard Case was the law of the forum and he was bound to follow it. Mr. Vance, the Trustee acquiesced in the judgment.

Every argument advanced by the respondents is fully answered and disposed of by the Pritchard Case. The Supreme Court of New Mexico states that an attorney's charging lien is a peculiar lien in that it has nothing in possession until the judgment is entered.

Almost any law suit of the type and class before the State District Court is for an unliquidated amount.

Respondents state that the question is not presented as to whether or not a client is attempting to defraud his attorney. It is believed that the word "defraud" is used advisedly in the decision. The ultimate result of the position of the respondents is that they tried their case in the State District Court. Being dissatisfied with the results, they now wish to try it over in a new forum, the sole pur-

pose being to deprive petitioners of a fee to which they are well entitled.

POINT II.

Respondents persist in arguing a point of law under Point II, which petitioners have never contended. We have never cited the Pritchard Case or O'Hara vs. Oakland County, 136 F.(2nd), 152, 6 CCA, to the effect that it disposed of a question of jurisdictional conflicts. We cited them for the proposition that an attorney is entitled to a charging lien to reimburse him for his efforts. The rule in the State of New Mexico is that an attorney does have a charging lien. The law is so well established that the courts of the United States are bound by the decisions of the highest courts of the State in which they sit that authority for the proposition is unnecessary.

It is quite true, as stated by the respondent, that the Court denied a lien in the Pritchard case but in that case the attorney failed to protect his rights. Petitioners have never failed to make public at all times their claim of lien and have taken every step possible under the laws of the State of New Mexico and under the laws of the United States to call to the attention of the world their claim of lien.

POINT III.

Point III of respondent's answer seems to be devoted first to ridiculing the complaint filed by petitioners and next to attempting to explain away Sherman vs. Buckley, 119 F (2d) 280. In their argument under this point, respondents argue that because Sherman vs. Buckley, supra is decided in the State of New York under a statutory provi-

sion for attorney's charging liens, that it can be distinguished from a case decided in the State of New Mexico wherein an attorney's protection comes from the common law rather than from an act of the legislature. The courts of New Mexico have recognized an attorney's charging lien as a valid and subsisting lien.

Vance, the Trustee, entered his appearance in court, took advantage of all of the work done by petitioners, and whether or not petitioners' complaint was adequate, it was certainly sufficient to ultimately bring a judgment of $60,000 which the trustee in bankruptcy and the Albuquerque National Bank have gone at great lengths to protect at the expense of the petitioners.

There is simply no way to explain away Sherman vs. Buckley supra. That case covers every phase of this case, and that case has been followed by the petitioners as the only case in point and the course pursued by petitioners in this litigation has been in exact conformity to Sherman vs. Buckley, supra.

In Sherman vs. Buckley, supra, Mr. Justice Hand said at page 282:

> "We deal with the case as though he (Sherman, Trustee) had been openly the party plaintiff. He could of course substitute other attorneys, as he did, and Buckley and Buckley were obliged to retire; but the substitution did not affect their charging lien."

We think this brings us squarely within the Buckley case. In the instant case the trustee did not pursue the litigation under the name of the bankrupt. He did not attempt to hide behind the bankrupt. He substituted himself "as a party openly." Mr. Justice Hand treats the Sherman case on the basis that Sherman was the party plaintiff. How,

then, can there be a distinction between the two cases as Vance was actually substituted party plaintiff in the case at bar?

Respondents quote from Judge Hand's decision apparently relying on the following language: "That as the trustee had brought Buckley and Buckley summarily into the bankruptcy court and insisted upon the liquidation of their lien * * * they would not have had any defense." We believe the correct interpretation of Judge Hand's statement is simply this: That the trustee in bankruptcy had two forums in which he could have liquidated the lien—he could have done it in the State Court or in the Federal Bankruptcy Court, but not in both. Mr. Vance elected to determine the rights of petitioners in the State Court, as did the trustee in the Sherman Case.

Respondents take an inconsistent position as to liens. They contend that since their notes were secured by chattel mortgages and warehouse receipts that they are preferred creditors. If the law gives the lien, we do not comprehend why a lien secured by goods and chattels is any more valid than a lien secured by a prospective judgment. The ultimate and important fact is—does the law give a lien against an ultimate res whether now in being or to be created?

If the litigation had originated in the Federal District Court, it is quite reasonable to believe that the lien claimants would have their lien liquidated in the Federal Court, but if the litigation originated in the State Court and was continued in that Court, then the lien claimants' rights should be determined in that Court. Having lost in the State Court and being dissatisfied with the decision they now undertake to relitigate the question in the bankruptcy court.

POINT IV.

In respondents' argument at this point, they place great emphasis on the fact that the only matter before the State District Court was the struggle between the bankrupt Stuart and the trustee in bankruptcy and their respective attorneys as to who would prosecute the litigation. They seem to ignore the fact that in the course of their struggle, petitioners came up with a charging lien of fifteen per cent against any recovery that might have been made in the law suit. There must be a time and place not only in this jurisdiction but in every jurisdiction when any order which fixes a lien becomes final and appealable. Whether the order was appealable in twenty days, ninety days, or at the time the final judgment was entered dismissing the complaint, seems unimportant. The fact is the trustees and the bank were both parties to the litigation and at no time did they ever appeal from the order. The bank came voluntarily into the law suit. In fact, the bank accepted service of the Second Amended Complaint before it was ever filed (Tr. 34). It will be noted that Stuart, in the original complaint, set forth the rights of the bank (Tr. 34) and neither the bank nor the trustees in bankruptcy have ever cited any authority that the bank was a necessary party to the litigation.

We do not believe that Burns vs. Fleming, 48 N.M. 40, 145, P.(2d) 861, or Foster vs. Addington, 48 N.M. 12, 148, P.(2d), 373, are in point. In each case the orders entered were of an entirely different nature from this case. It must be borne in mind that the petitioners Jackson and Horan were never parties to the litigation. They were always the attorneys for a litigant and their lien was a public record when the bank entered the law suit.

The contract upon which the lien of petitioners was based was entered into more than four months prior to bankruptcy. The Circuit Court of Appeals has held that the state court's order (Tr. 1) was void on its face. It seems incredible to us that an agent of the bankruptcy court, which the trustee was, can avoid the order of the State District Court, which the trustee induced by his own conduct, or that the order can be held void as to him.

Great emphasis is given to the case of Gross vs. Irving Trust Company, 286 U.S. 342, and Taylor vs. Sternberg, 293 U.S. 470 by both lower courts, the Taylor case being the later of the two, reiterates the rule of the Gross case, but adds a distinguishing factor in support of petitioner's position. Petitioner has throughout this case maintained that there is no parallel between the case at bar and the Gross case, the Gross case being predicated upon receivers appointed by a State Court. Jackson and Horan were *never* appointed by the court as receiver and were never attorneys for a receiver. They were attorneys employed to represent a client and a litigant, and there is a wide distinction between them and a receiver and his attorneys appointed by a court.

The petitioner here predicates his claim upon a valid, subsisting contractual charging lien. In the Taylor and Gross cases, the status was that of a receiver and attorney for a receiver appointed by the court.

It is stated in Taylor v. Sternberg, supra:

> "The status of a receiver is unlike, for example, that of an assignee for the benefit of creditors. The receiver is an officer of the court which appoints him. (citing cases.) The property in his hands is not, in a legal sense, in his possession. It is in the

possession of the court, *whose appointee he is,* by him as its officer. (citing cases.) In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. The result was binding on the state court and equally binding on the receiver as custodian for that court."

"Cases dealing with assignments, like Louisville Trust Co. v. Comingor, 184 U.S. 18, 46 L. ed. 413, 22 S. Ct. 293, 7 Am. Bankr. Rep. 421, cited by petitioners, in no way militate against this conclusion."

It is important to note that the Supreme Court of the United States makes a very clear and definite distinction between court-appointed receivers and other persons, such as assignees for benefit of creditors, who are not court-appointed but may be designated by the debtor as was the case here. No one has ever argued that petitioners considered themselves as receiving the fee for their services for the benefit of the State Court or anyone else. Petitioners expected to pocket a well-earned fee when collected, and were claiming it adversely to the bankrupt.

Louisville Trust Company v. Comingor, supra, is cited with approval and the principals stated therein are reiterated in Galbreth v. Valley, 256 U.S. 46, 65 L. ed 823, 41 S. Ct. 415, in which the court said:

"The principal of the Comingor case has never been departed from in this court. It established the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith, before the bankruptcy proceedings, to have the merits of the claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for the contempt is the

means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest duly made, against that method of procedure. '

Analyzing the decisions of the Supreme Court in the Gross Case, Sternberg Case, and Galbreth Case, it can readily be seen that the Court is making a wide distinction and that there is a marked cleavage between receivers and their attorneys, who are court appointed claimants; and persons acting in their private capacities under contract or agreement with the bankrupt or creditors.

If the Circuit Court was attempting to distinguish the Sherman case from the case at bar, as we see it, it is impossible to do so. Further, the Gross and Taylor cases when carefully analyzed uphold our contention that the petitioner is entitled to his compensation secured by his lien, for by analogy petitioners have the same status as an assignee where the bankrupt, more than four months before bankruptcy, entered into a contract for services, services were performed, and compensation earned. The Sherman case was decided in 1941 and the Gross case in 1933. It is hardly conceivable that Mr. Justice Hand overlooked that decision. He was following the philosophy of the law as established throughout the decisions, that is to say, court-appointed — "No," non-court-appointed — "Yes." The court-appointed receiver is acting through the power of the court appointing him, which brings jurisdictional questions into issue. The petitioners, attorneys,

assignees, etc., are acting through their right and power to contract which Congress did not abrogate by the Bankruptcy Act.

POINT V.

Under Point V respondents present nothing that has not previously been discussed and presented to the Court. Consequently, we say nothing in connection with this.

CONCLUSION

In conclusion, it is respectfully submitted that there is no parallel between the case at bar and the Gross v. Irving Trust Case; that at no time were the petitioners ever employed by any court, State or Federal, in the prosecution of this litigation, or ever designated by any court to act, but they were attorneys employed by a client under contract in their private capacity to handle litigation for them.

As was pointed out by Mr. Justice Hand, had the trustee wished to avail himself of the exclusive jurisdiction of the bankruptcy court, he need never have entered the State Court, but he did. The position of respondents can only result in their having two days in Court, both of which they have selected themselves.

Since there is no parallel in our opinion between the cases cited by respondents and the case at bar, certiorari should be granted.

Respectfully submitted,

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